October 15, 2003

Hon. Maura D. Corrigan
Chief Justice,
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

RE: ADM File 2002-34
Amendment of MCR 7.204, 7.210 and 7.212

Dear Chief Justice Corrigan:

The Appellate Practice Section of the State Bar of Michigan extends its thanks to the Michigan Supreme Court for the opportunity to comment at the court's Administrative Hearing on September 25, 2003. We would like to address three issues raised during the hearing: the American Bar Association's Standards Relating to Appellate Delay Reduction; appellate practice in Ohio; and the 1997 differentiated case flow management proposal. We also want to present you again with a compromise proposal that was developed after the September 25 hearing.

**The American Bar Association Standards**

In its Standards Relating to Appellate Delay Reduction, the American Bar Association suggests that an intermediate appellate court should decide 75% of its cases within 290 days and 95 % of its cases within one year. Carl West Anderson, *Civil Justice Reform: An Appeal for Practical Appellate Reform*, 37 Judges' J 28, 30 (Spring 1998). The ABA, however, recognizes that these standards are merely "reference models," not strict time lines. *Id.* We know of no intermediate appellate court comparable to Michigan's that has achieved this model's objective. The Court of Appeals' goal of 95% in 18 months is more realistic for Michigan at present and should be achieved before more ambitious ones are set.

Since the last revision of the ABA's Standards in 1994, the National Center for State Courts has published its Appellate Court Performance Standards. The NCSC recommends that intermediate appellate courts identify goals in four specific areas: "(1) protecting the rule of law; (2) promoting the rule of law; (3) preserving the public trust; and (4) using public resources efficiently." 37 Judges' J 31. By identifying these goals, courts can and should focus on what they are doing to "render just, timely, and consistent decisions." *Id.* (The NCSC standards are available at www.ncsconline.org/WC/Publications/Res_AppPer_PerformanceStandardsPub.pdf)

Both the ABA and NCSC committees learned that, in creating a delay-reduction plan, "the court should seek the assistance of a design team consisting of representatives of all participants in the process . . . ." 37 Judges' J 65. Anderson suggests that the team consist of representatives from the trial court to address record production issues, appellate attorneys and specialists, and representatives from all phases of the process in the appellate court. Regrettably, this recommendation does not describe the development of the Michigan Court of Appeals' 2002 delay-reduction proposal.

This Court might also take note of recommendations by the Appellate Caseflow Management Improvement Project of the Justice Management Institute. Hoffman & Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 Ind L Rev 467 (2002). The authors commend courts that make rulings on these extensions as an administrative decision rather than by a motion that takes judges' time. In addition, the article also made many of the same recommendations as were offered by the State Bar of Michigan's Ad Hoc Delay Reduction Task Force.

The Justice Management Institute recognized that record production is one of the major problems in appellate court administration. 35 Ind L Rev 488. It proposed several technology-related solutions, including computer-aided production of transcripts; electronic filing of trial court and appellate records; video-conferencing; computer-based issue tracking, and computer-based management information systems. 35 Ind L Rev 491.

The Appellate Practice Section urges that the Record Production Work Group look at some of these proposals and that the court as a whole review the Justice Management Institute report.

**Appellate Practice in Ohio**

During the September 25, 2003 hearing, several members of the court referred to Ohio's 20-day deadline for filing appeal briefs. In response, the Section has investigated the rules and practices of the Ohio District Courts of Appeals. Several significant points emerged.

Ohio App R 18(A) provides that the appellant's briefs shall be filed "within twenty days" (with an additional three days for service by mail) after the trial court record has been filed with the clerk of the court of appeals and that the appellee's brief is due twenty days after the appellant's. In practice, however, extensions of these deadlines are routine, with some variation among the twelve district courts.

- Extensions are part of the routine in criminal appeals. One Ohio lawyer who worked for an District 8 (Cuyahoga County) judge reported that attorneys appealing criminal matters are often given up to four extensions of time.
- A prosecutor in Dayton (Montgomery County) reports that either party to an appeal may request an extension of time. Parties may stipulate to an extension, but it is still treated as a motion that must be granted by the court. There is, however, no motion fee.
- A lawyer in the Lucas County (Toledo) Prosecutor's office's appellate division reports that, in essence, the 20-day deadline is rarely enforced. Criminal defendants-appellants get unlimited extensions because the court is concerned about the ineffective assistance of appellate counsel. Prosecutor-appellees are granted up to two 30-day extensions. In other words, in criminal cases, appellants effectively have an unlimited amount of time to file their briefs while prosecutors have up to 80 days.
- Extensions are also routine in civil cases. A practitioner in District 7 (Youngstown) commonly receives at least three extensions of time, typically 30 days each.

- Other districts purport to require "good cause" but grant extensions as a matter of course. Only a few seem more reluctant to grant motions for extensions of time.

In short, although Ohio does set a much shorter briefing schedule than Michigan, the courts are flexible in implementing their rules and allow attorneys additional time when they request it.

**The 1997 Differentiated Case Management Proposal**

The Appellate Practice Section is dismayed at the perception that we "were not supportive" of the 1997 proposal differentiated case management ("just in time" briefing) proposal (ADM File No. 97-57). Although the Appellate Practice Section opposed the 1997 proposal, our position was based on the inflexibility of the proposed briefing deadlines, not the differentiated case management features of the plan. Our concern was heightened because, at the time, the court was still applying a "strict enforcement" policy of its rules.

The 1997 proposal was withdrawn in a letter dated October 14, 1998, which also stated that

> Between this date and January 2000, [the Court of Appeals] will compile multi-faceted caseload statistics for which we can evaluate (1) the continued need for a formal briefing schedule experiment and (2) how to best *implement* such a project. At the end of the compilation period, we will report to the Supreme Court on the results of our research, and declare at that time whether we continue to believe that the briefing schedule experiment should be pursued.

Three-and-a-half years passed before Chief Judge Whitbeck presented the current plan. During that time, the Section Council often discussed the Court of Appeals' backlog and asked the court's staff members about its status. The court, however, never invited the Section to participate in developing a "delay reduction" plan. Our first notice of the Court of Appeals' present proposal came from Judge Whitbeck's presentation of it, in April of 2002, during his tour of organizations from which he was requesting support.

We feel strongly that it is historically inaccurate to suggest either that the Appellate Practice Section has categorically rejected differentiated case management or that it has dragged its feet in responding to the court. In the case of both the 1997 proposal and the current plan, the Section has found itself in the position of reacting to a finished plan, proposed by the court with no prior input from the bar. Both plans, in different ways, reduced briefing time and deadline flexibility too severely to permit our members to serve their clients and adequately assist the Court of Appeals. Now, as in 1997, the Section is committed to reducing delay without compromising the quality of justice.

**The Appellate Practice Section's Compromise Proposal**

We believe that the Court of Appeals' current delay reduction proposal is flawed. As we have repeatedly explained in our prior submissions and at the administrative hearing, all of the briefing time cuts are almost certainly unnecessary. Nonetheless, the Appellate Practice Section

Council has recognized that smaller cuts in briefing time would be less injurious to the appellate process than the proposals discussed on September 25, 2003.

Accordingly, after vigorous debate and with much reluctance, the Appellate Practice Section Council, at its October 8, 2003 meeting, agreed to suggest a compromise. The Section Council prepared the following proposal, which we authorized Scott Brinkmeyer of the State Bar of Michigan to convey to Judge Whitbeck:

> In an administrative order, adopt the following experimental and temporary changes to MCR 7.212, in non-expedited cases, ***for one year*** (we propose an administrative order so that the bench and bar may evaluate the effect on delay reduction after one year):
>
> 1. Allow either party to stipulate to extend the time for filing a brief for 21 days;
> 2. Allow either party to move for an additional extension of time not to exceed 21 days;
> 3. Specify that the motion to extend time be freely granted;
> 4. Keep Court of Appeals internal operating procedures that allow the entire 42 days to be obtained by motion alone; IOP 7.212(A)(2)-2; and
> 5. Adopt a mailbox rule [i.e., consider briefs "filed" when mailed].
>
> These changes would reduce each side's potential extension time by 14 days in each appeal, for a potential 28-day shortening of the briefing time period per appeal (if all extensions were used). In addition, specifying that the motion to extend must be freely granted and keeping the IOP policy of allowing the full extension time to be available by motion alone, maintains the procedures that practitioners have relied on since before the adoption of the Michigan Court Rules in 1985. As the Court knows, we fear that one of the effects of reduced briefing time may be to enlarge the warehouse.

Implicit in our proposal is that the initial 56-day period for filing the appellant's brief (MCR 7.212(A)(i)(a)(iii)) would remain the same, since the rule itself is not being amended. We consider this proposal to be consistent with Timothy Baughman's suggestions during the comment period, which were described at the administrative hearing as "very worthwhile."

On Thursday, October 9, 2003, Scott Brinkmeyer conveyed this proposal to Chief Judge Whitbeck. The Chief Judge responded that Items 2-5 were acceptable, but Item 1 was not. The Appellate Practice Section, through its Council, urges this Court, if it adopts an administrative order now, to include the shortened stipulation provision. We explain our reasons for this request below.

**The Appellate Practice Section Continues to Oppose Elimination of Stipulated Extensions**

The stipulation to extend has been part of Michigan's court rules since the Court of Appeals was created, 38 years ago. GCR 1963 815.1(1) [see also 815.2(1)] provided for stipulated extensions of at least 60 days. 1 Mich App lxxviii (1965). Later amendments reduced the time to 30 days and then to the present 28 days, but never sought to do away with the stipulation itself.

Maintaining a stipulated extension of at least 21 days is a feature of the appellate rules that the Appellate Practice Section believes will significantly benefit the Court of Appeals as well as the parties who appear before it. There are several reasons for our position:

- Stipulated extensions provide the only flexibility available to criminal practitioners, because neither assigned appellate defense counsel nor prosecutors on appeal can afford the fees for motions to extend.
- Stipulated extensions preserve at least some "predictable flexibility, which is essential to caseload management for all appellate practitioners.
- Stipulated extensions encourage professional courtesy among appellate lawyers.

The only additional restriction on stipulated extensions that the Appellate Practice Section could agree to would be a provision that a stipulated extension, for 21 days, must be submitted to the Court of Appeals in the form of a proposed order. The Court of Appeals would "freely grant" such orders, which would be processed without a motion fee.

**Conclusion**

The Appellate Practice Section respectfully suggests that the proposed changes to MCR 7.212 would be counterproductive and would only increase the warehouse at the expense of justice. If, nonetheless, this Court believes that a cut in briefing time is necessary now, we urge the Court to tread cautiously and adopt a moderate reduction on an experimental basis. The stipulated extension is a traditional Michigan appellate scheduling tool that is essential for many, valuable for all, and harmful to no one. It should be retained in the Michigan Court Rules.

Very truly yours,

Victor S. Valenti /BH

Victor S. Valenti, Chair
Appellate Practice Section

cc: Hon. William Whitbeck
Scott Brinkmeyer